

August 27, 2020

The Honorable Judge Bianco
U.S. District Court – EDNY
100 Federal Plaza
Central Islip, NY 11722

**Re: Berard admits CTE in corresponding litigation pre-EDNY trial
(Yet—it was undisclosed by the government as a crucial “memory”
witness) ¹**

Your Honor,

As the Court knows, the government raised the issue of *faulty memory, confusion and mistakes* to support their witnesses’ testimony *en masse* for the first (1st) time post-trial ([ECF No. 440 at 16](#)). It would appear obvious that the *faulty* testimony was eventually supported by that insufficient evidentiary basis of documented “memory loss”—and would have been crucial for the government to disclose pretrial. The Court could have decided how to address acknowledged memory loss victims (thru CTE) to the trier of fact. ***The government specifically chose not to disclose it.*** Subsequently—the government only chose to raise it during its defense of the synchronized trial testimony that universally contradicted the entirety of their Rule 16, pre-trial empirical evidence—including everything the witnesses had previously testified to under oath.

- Kenner addressed this issue of acknowledged CTE by the government witnesses ([ECF No. 773](#)), yet—although clearly qualified under the ‘new evidence’ standard as a vital evidentiary factor—it remains unaddressed by the Court.
- Kenner re-news his request for an evidentiary hearing and further investigation deemed necessary by the Court related to the pretrial admissions of “memory loss” by the government star-witnesses.

Pro-Kenner transparency evidence piles up...

Owen Nolan’s attorney compounded the ‘new evidence’ issue in 2020; further highlighting Kenner’s *truthful* representations to the Court about severe memory loss issues and veracity of trial testimony. Nolan’s attorney’s submission ([ECF No. 843](#)) continues to underscore the ever-changing ‘memory’ conditions of the government

¹ At sentencing, “the Court is virtually unfettered with respect to the information it may consider.” *United States v. Alexander*, 860 F.2d 508, 513 (2d Cir 1988).

witnesses (alleged as victims of *concealment*—‘*what they remember they were never told*’).

Nolan's counsel *verified* that Nolan is upset about the potential “\$1,656,357” restitution of funds.² Counsel argued: “*That number only includes the money Mr. Nolan contributed to the various property and development projects at the heart of this matter*”. **Kenner agrees!** Five-plus years post-trial, Nolan *re-remembered* his actual investment—despite its direct contradiction to his trial recollections (*Tr.2065-66*). Nolan is only an investor on the Hawaii project—*here*.

Nolan's NY attorney's June 2020 submission to the Court *verified* his now-admitted “*contributions*” to real estate deals at the “*heart of this matter*” (*ECF No. 843: referring to his \$2.3 million Hawaii investment*) (a.k.a. ‘new evidence’).

- Not only is the attorney's reformatory statement factually accurate (matching 100% of the Rule 16 evidence)—it specifically matches Nolan's one-page, *signed* and *dated* (“10/29/04”) *Extension of Credit* with Northern Trust Bank (*Ex. A*)—verifying Nolan's “\$2,200,000”—“*Investment in Little Isle IV LLC*”—but Nolan's knowledge is documented and re-corroborated:

- (1) By his own signatures on fifteen (15) *other* Northern Trust LOC documents between 2004 and 2007 from the 2015 trial subpoena—representing only a subset of the total documents Nolan signed with Northern Trust Bank (*Kenner Trial exhibit 210, introduced at Tr.4205-06*)—and;
- (2) Thru his Northern Trust Banker, Aaron Mascarella's *testimony* to Nolan's attorney in March 2009 (*Ex. B: pre-arbitration*) that he *personally* spoke to Nolan between 2003-06 multiple times about Nolan's LOC—conveniently ignored weeks after the exculpatory statements when Nolan denied any knowledge of their inter-personal dealings and underlying LOC knowledge—and;

Noting: In or about March 2006—Nolan signed with Northern Trust Bank for

² This net total for Nolan was a result of the Northern Trust settlement with Nolan of approximately \$500,000 (*Tr.2074*) from his original \$2,300,000 Hawaii investment. The net total does *not* include the \$592,878 that Nolan *also* received from interest payments during the *collateralized investment strategy* from 2003 thru 2009—or his \$3,250,000 settlement (or ‘assignment’) offset with Jowdy (for every entity of Jowdy's, known or unknown, that received funds from Nolan, directly or indirectly).

- In total -- \$2,088,324 of interest was paid to *all* of the LOC investors (***a clear offset for loss and restitution***)—including Norstrom, Gonchar, and Murray who were removed from the superseding indictment 2 weeks prior to trial—based on their defiance to participate in the government's theories of prosecution—verified by their exculpatory submissions pre-trial.

- a \$1,500,000 land loan—which documented Nolan's IMUS (investment) account and his Northern Trust LOC which was pledged against his assets. One-year-and-a-half later—Nolan referenced his asset pledge during his December 2007 text conversation with Kenner (12/28/2007): “*Where's the package that needs signed plus jp [Nolan's hockey agent and attorney] needs 200000 for toronto settlement...where r we getting that money since everything is tied up...He said in order to write it off it needs to be paid this year...Call me need to discuss this*”—and;
- (3) By (i) Nolan's wife, (ii) personal assistant, and (iii) Wells Fargo private banker—while collectively managing Owen's Northern Trust LOC and related payments (*Ex. C: Myrick-Diana Nolan email re-Owen Nolan's LOCs*) (*Ex. D: Myrick-Diana Nolan email re-Owen Nolan's LOCs*) (*Ex. E: Myrick-Northern Trust Banker Mascarella email re-Owen Nolan's LOCs*) (*Ex. F: Myrick-Diana Nolan-Wells Fargo private banker Crane email re-Owen Nolan's LOCs*) (*Ex. G: Myrick-Kenner email re-Owen Nolan's LOCs et.al.*); leaving it an impossibility for any concealment from Nolan—without all of them involved—and;
- (4) Thru the direct text communication between Kenner and Nolan (i) prior to, (ii) during (including 2 documented phone calls), and (iii) after he *signed* his 2007 LOC renewal documents as Kenner explained via text on 12/23/2007:
- [Kenner]: “*I need to send you via FEDEX LOC docs from Northern Trust that MUST be signed and returned by the end of the year.*” –
- [Nolan]: “*What r the papers for And why the sudden rush*” –
- [Kenner]: “*The papers are for your Line of Credit at Northern Trust. The Bank sent them to me for the renewal of the LOC on friday and said they MUST be signed and returned by end of year. Its not just you. All of the guys have to do it. I don't make these rules. Your ppwk is the last of the guys to get done.*” (*ECF No. 736 at 54-57; ECF No. 770 at 100*)—and ultimately;
- (5) Thru the group-participation—including Nolan's wife preparing his taxes (*Tr.2112*) with his Hawaii K-1—verifying his \$2.3 million original Hawaii investment (*Ex. H*)—or “*contribution*” as his New York attorney re-substantiated in 2020.³

³ *Nolan produced his actual K-1 tax record from his personal files* during the 2009 arbitration (*Bates stamp: Nolan000005044*)—not as the government mis-represented to the Court during trial (*Tr.2144-46*):

[Michiewicz]: “*So the only place we know it lives is in the defendant's own home and records. We have no information that this information ever either got to Mr. Nolan or was filed with his return to the IRS.*”.

- This was obviously false and misleading to the Court—with full government knowledge—including Kenner forwarding the Nolan-produced K-1 to the SEC in 2010—second *Bates stamp: PK_SEC_013677*.

Nolan's obvious—post-2007—CTE-symptoms confirms that Nolan was aware in real time of his individual LOC—AND—Nolan's 'inner circle' had absolute knowledge of everything Nolan invested in.

Bryan Berard...

In 2014—Bryan Berard sued the National Hockey League (“NHL”)—with over 300 other NHL players—for Chronic Traumatic Encephalopathy (“CTE”) in 2014...⁴

- This litigation was known by FBI agent Galito and withheld from Kenner and the defense attorneys, strategically—considering the government expected Berard's testimony to *'forget what he previously verified under oath'*.

Noting: Berard and Kaiser worked hand-in-hand with FBI agent Galito for almost two (2) years to *create* the case versus Kenner, in constant pre-arrest communication—while working for Jowdy and Harvey.⁵

Berard is solely involved in the Hawaii project *here*, like Nolan—with a \$650,000 LOC (*not the \$1.1 million he mis-represented to the FBI in 2013: 3500-BB-1-r at 2—* *or—his underlying fabrication about finding out his LOC status from a Northern Trust phone call, mis-representing in testimony: “Honestly, I was playing in Russia. I got back in 2009, and basically remember just kind of getting a phone call from Northern Trust that I lost close to a million dollars in my pledge account.” (Tr.3040, continuing known mis-representations under direct examination at Tr.3041-42).*

- In reality—Berard had a text conversation with Kenner about his LOC seizure *before* the collateral was taken; long before his return from “Russia”—and 5-days *before* he spoke directly to the Northern Trust Bankers Brill and Mascarella (as

⁴ CTE is Chronic Traumatic Encephalopathy. The primary symptoms of CTE have been described neurological experts, including Dr. Anne McKee at Boston University's Neurological Center as:

*“CTE, a catastrophic disease first associated with boxers long ago, results when a toxic protein, Tau, accumulates in the brain, kills brain cells, and leads to symptoms such as cognitive dysfunction, **memory loss**, sleeplessness, depression, diminished impulse control, episodes of anger, and dementia, among others. Until recently, CTE could only be confirmed through an autopsy. **Tau proteins are released whenever concussion occurs.**”*

⁵ The NY Daily News (November 13, 2013) touted Kaiser and Berard as “*heroes*” (no one else) for their efforts with FBI Agent Galito and featured them in an arrest-day article titled – “**Former NHL Player Bryan Berard and ex-cop help Feds nail two Arizona men in massive fraud**”.

- Apparently announcing Jowdy and Harvey's crucial involvement was a 'bridge too far'.

required—like every LOC client: [ECF No. 719 at 28-29](#) [Peca example]⁶). In March 2009—before Berard's verbally authorized seizure, Berard texted Kenner about the “*use*” of his residual “*~300k*”:

| | | | | |
|------------------|--------------------------------------|-----------------------------------|------------------|---|
| 6 2 0 7 | +14015 246929 Bryan Berard* | 3/26/2009 6:53:59 PM(UTC+0) | R e a d | [Berard]: When u get chance can we look at how much money will b freed up after payn off line of credit NT??? Thanks |
| 7 2 8 0 | +14015 246929 Bryan Berard* | 3/26/2009 7:00:51 PM(UTC+0) | S e n t | [Kenner]: ~300k |
| 6 2 0 8 | +14015 246929 Bryan Berard* | 3/26/2009 7:04:18 PM(UTC+0) | R e a d | [Berard]: Cool thanks!!! When will that b freed Gonna use 200 for a cool oppurtunity will show u and talk 2 u abt it later. Good for all of us n future. |
| 7 2 8 2 | +14015 246929 Bryan Berard* | 3/26/2009 7:30:08 PM(UTC+0) | S e n t | [Kenner]: Can't wait to hear! |

- The *direct* texts with Kenner were *5-days before* Berard approved his collateral seizure on the phone with Northern Trust Bankers, Mascarella and Brill from Northern Trust—*just like the other seven Hawaii LOC clients were REQUIRED to do—independent from Kenner* ([ECF No. 668 at 119-20](#): Peca call confirmation; [at 282-84](#): Sydor memory failure of mandatory Northern Trust phone call).

Berard received full offset—and then some...

Berard verified thru testimony at trial he received from Northern Trust Bank: “*after lawyer fees and stuff, it was close to 300,000*” ([Tr.3042](#)).

In addition—the Court should acknowledge that part of Berard's settlement with Jowdy was his high-paying job at Diamante Cabo san Lucas for at least 5 years—in addition to his equity settlement—valued at approximately \$3,000,000—commensurate with the Nolan and Juneau ‘settlements’ of the same date.

- These are all obvious offsets—for guideline and loss calculations—to his Hawaii “*investment*” that he *signed* and *dated* (“*3-7-05*”) with Northern Trust Bank ([Ex.](#)

⁶ Sydor communication with Northern Trust the day of the collateral seizure—forgotten at trial—notwithstanding premeditated memory loss ([Tr.2166-67](#)):

| | | | | |
|------------------|--------------------------------------|----------------------------------|------------------|---|
| 6 3 1 6 | +19725 230505 Darryl Sydor* | 4/1/2009 8:48:29 PM(UTC+0) | R e a d | [Sydor]: Hey someone from northern trust called with someone from schwabb. And want to do a conference call in a hour with erin [Mascarella]someone |
|------------------|--------------------------------------|----------------------------------|------------------|---|

V: "900,000.00"—"Investment in speculative real estate").

Justice Gorsuch opined before joining the Supreme Court in 2017: "[w]ithout an actual loss, there could be no victims" in *United States v. Evans*, 744 F.3d 1192; 2014 U.S. App. LEXIS 4490 (10th Cir 2014); referencing *United States v. Turk*, 626 F.3d 743 (2d Cir 2010) to contrast the loss calculation method of actual 'passive equity' investors—as is the case *here*—after being mis-applied by the 10th circuit district court judge.

At his earliest documented testimony (prior to meeting FBI agent Galito and working for Jowdy)—what did Berard voluntarily confirm under oath in 2009 (Ex. L)?

- **Noting: Berard's voluntary testimony was less than 8 weeks after his collateral seizure at Northern Trust Bank...**

Q: When you were – as far as the Hawaii deal, were you made aware of any sort of transaction Mr. Kenner set up where you can give a commitment or pledge a credit line in lieu of putting all your money in initially?

A [Berard]: Yes.

Q: Can you tell the panel what was your understanding?

A [Berard]: Basically the company – it was set up. The company would pay the [LOC] payments. I would pledge the money [for the LOC], obviously to get a loan for the property. Again, the company would pay the payments, and I was not forfeiting all the amount of money for the piece of property.⁷

Q: Were you aware that Mr. Kenner got a credit line [LOC] against some securities or investments you had?

A [Berard]: Yes.

Q: And later on were you aware that Mr. Kenner started lending this money to another principal in the Cabo project named Ken Jowdy?

A [Berard]: Yes.

⁷ The Court should note that Kenner was charged in Counts 7 & 8 for making the 59th and 60th payments on the 5-year-long Little Isle 4 LOC loans that Berard verified he *expected* to be paid by Kenner...**What reasonable standard did the government use to make the charges?** Even 9/19/2013—less than 2 months prior to Kenner's arrest—Berard *verified thru testimony* to the FBI that: "*The LOC would be used to pay the interest on the loans against the Hawaii property*" (3500-BB-1-r at 1). They were...and Kenner was charged with it.

Q: Where did you think the money that Mr. Jowdy – were you told where the money was going to be used that was given Mr. Jowdy as far as the Mexican project? Was there anything you were told about that?

A [Berard]: Basically just loan him the money for the project.

Q: What about bank statements; did you have any problem getting any of your bank statements from Mr. Kenner at any time?

A [Berard]: Not at all.

Q: And prior to signing any of these documents did you have access to your own attorney unconnected to Mr. Kenner to review this?

A [Berard]: Yes I did. We have a family attorney back home where before I sign any documents basically – I went to his office, sat with him. We reviewed them, and I signed them and basically FedEx'd them to Phil [Kenner].

Noting: Berard volunteered for his 2009 arbitration testimony—also—*after* the date that he no longer found Kenner “*legitimate*” (per his 9-19-2013 FBI proffers: *3500-BB-1-r at 3*). It is hard to reconcile his voluntary 2009-testimony with his reformative 2013 *mis-representations* to the FBI—yet not held to an equal standard of justice while employed by Jowdy's well-protected cabal (See 18 U.S.C. 1001).

Yet even with Berard's *independent* family attorney, *supra*, reviewing all documents before Berard *signed* them—he testified that he had no idea about the Hawaii project management (*Tr.3099-3100*):

Q: By the way, when you invest in Hawaii, you and Phil Kenner, or did Phil discuss with you how the investment would be organized from a corporate structure, something known an LLC?

A [Berard]: No.

- See *Ex. K at 1, 4: signed by Berard at 12; referencing Ex. N (the Little Isle 4 By Laws)* ⁸

⁸ A party to an agreement is “charged with knowledge of the contents of the [] contract and [is] bound by the clear and unambiguous terms of the same.” *Johnson v. Hardware Mut. Cas. Co.*, 108 Vt. 269, 187 A. 788, 794 (Vt. 1936) (alterations in original). ***In a statement stunningly apposite today—as it was nearly a century and a half ago—the Supreme Court opined:***

“It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained.” *Upton v. Tribilcock*, 91 U.S. 45, 50, 23 L. Ed. 203 (1875) (*Hetchkop v.*

Q: Well, did you have an understanding as to who would have the control, but also the responsibility for use of the line of credit funds when you invested?

A [Berard]: No.

- See *Ex. M: Berard signed Letter of Authorization—from Northern Trust trial subpoena* ⁸

Q: You had no understanding of that?

A [Berard]: No understanding, no.

Q: Was the name managing member ever mentioned to you -- withdrawn. Was the name "managing member" or the term "managing member," ever discussed between you and Phil in relation to your investment in the Hawaiian project?

A [Berard]: I don't recall.

- See *Ex. K at 1, 4: signed by Berard at 12; referencing Ex. N (the Little Isle 4 By Laws)* ⁸

Berard signed off on the Arizona litigation to recover the funds Jowdy stole from the Hawaii loans (Ex. O at 9-16: signed by 19 Little Isle 4 members versus Jowdy)...

On page 1—the Arizona lawsuit attorney Baker disclosure for all of the Little Isle 4 members clearly identified the Jowdy loans; verifying (*Id. at 9*):

“the gist of the lawsuit is to recover certain monies loaned to Mr. Jowdy from Mr. Kenner, Little Isle 4 and Ula Makika LLC. Mr. Kenner estimates the total amount of monies loaned to Mr. Jowdy which have not been repaid to be approximately \$5,000,000. This is the estimated principle only, exclusive of accrued interest. In summary, Mr. Jowdy denies that the monies were loans but rather characterizes them as investments.”

- Berard *initialed* page 1—just like the eight (8) other pages.

Berard was also face-to-face with attorney Baker in May 2009 during the *Nolan v. Kenner* arbitration. At no time did Berard raise an issue with Baker re: *confusion* or being “*uncomfortable*”; nor did a single one of the nineteen (19) other Little Isle 4 members who *signed* the Baker disclosure (*Ex. O: complete set of 19 disclosures*) (*Tr.601-02: Michael Peca trying to describe his “truthful” answers that were going to become “uncomfortable”—in reality not because of Kenner—but because in 2011 he*

Woodlawn at Grassmere, Inc., 116 F.3d 28, 34 (2d Cir 1997) (holding persons have a “basic responsibility...to review a document before signing it.”).

realized he had to disclose to his wife that he signed, dated, and authorized his \$1,775,000 Extension of Credit (Ex. P) that verified “\$1,775,000...Increase to existing [\$1,600,000] loan used for speculative real estate investments” [hi-lighting the pluralized “investments” language]—and the underlying loans to Jowdy (Ex. Q: SDNY Grand Jury Tr. 30-33); wholly unknown to Kristen Peca until her 2012 surreptitious FBI recording of Kenner).⁹

Noting: California attorney Ronald Richards was also present with Berard—in May 2009, the same month Berard and the other Global Settlement Fund (“GSF”) involved people began their litigious efforts in California with attorney Ronald Richards versus Jowdy for the same ‘stolen’ 2004 Hawaii loan fraud.

With Ronald Richards representing him as a Little Isle 4 and Mexico investor—Berard was a plaintiff in two (2) California lawsuits versus Jowdy that attempted to recover the Little Isle 4 loans Berard verified during his *voluntary* 2009 arbitration testimony. Both the Diamante del Mar (“DDM”) (Ex. X at 7) and Diamante Cabo san Lucas (“DCSL”) (Ex. W at 7) lawsuits specifically identified the loaned funds:

“Mr. Najam was in charge of the corporate governance and while under Jowdy's direction and control, received over eight million dollars (\$8,000,000) from a LLC in Hawaii. Mr. Najam failed to properly account for those funds and has placed the Jowdy investors in a vulnerable and compromised position.”

⁹ Kristen Peca's 2012 recording confirms she had no knowledge that her husband had a LOC at Northern Trust Bank—yet the government induced her to fabricate her 2005 involvement in the set-up of Michael Peca's LOC—and her “*shock*” (Tr.709-711) when receiving Michael Peca's March 2009 default letter by “*sign[ing]*” for it (Tr.709)—despite the letter being mailed via FedEx and USPS Certified Mail to another address (verifying the impossibility of the event she was not part of in the first place). This atrocious and fraudulent testimony was left to stand uncorrected by FBI agent Galioto and a knowing prosecutorial team—fully knowing her 2012 FBI recording debunked her involvement or basic knowledge:

[Kristen Peca]: *Well, I was referencing the earlier stuff that you said, I don't remember a large amount being distributed back to our account and the timing of the years of the loan, the line of credit, that happened when we were in Ohio? I don't understand how it could have been open for 5 years before that? Because we had a bond account going? Do you mean the Hawaii; you had a line of credit, but not for us?*

[Kenner]: *No, no, you guys had lines of credit for 5 years at Northern Trust.*

[Kristen Peca]: *...for 5 years?*

[Kenner]: *...for 5 years! When you were in OHIO, that's when the thing closed.*

Even after Berard's frustrations from Jowdy's *negotiate-and-avoid-settlement* strategy since 2007 (*Ex. R: Constantine and Jowdy settlement emails in July 2007—within months of Kenner's first detection and exposé of the Jowdy illicit schemes*), Berard continued to work with Kenner and the other Hawaii-Mexico investors until the eve of his turncoat Jowdy employment like John Kaiser in 2011 (further debunking his 2013 FBI proffer testimony, *supra*). Near the end of the attempted settlement-litigation with Constantine and Eufora in 2010—Berard and Kenner exchanged the following texts after working hand-in-hand with Rudi Giuliani's team—specifically Giuliani's lead attorney, Michael Stolper for several months (concerning Jowdy and Constantine issues).

June 2010:

| | | | | |
|-----------------------|--------------------------------------|----------------------------------|------------------|---|
| 1 5 7 7 9 | +14015 246929 Bryan Berard* | 6/5/2010 9:30:43 PM(UTC+0) | S e n t | [Kenner]: We are hitting with the correct hammer this time. |
| 1 3 7 1 1 | +14015 246929 Bryan Berard* | 6/5/2010 9:43:24 PM(UTC+0) | R e a d | [Berard]: I agree. I don't give a fuck abt him [Constantine]. Just don't want him to fuck this up like Jowdy. |

October 2010:

| | | | | |
|-----------------------|--------------------------------------|------------------------------------|------------------|--|
| 1 6 9 4 9 | +14015 246929 Bryan Berard* | 10/7/2010 11:00:25 PM(UTC+0) | R e a d | [Berard]: I wanna just get these guys there \$ back and <u>let's go do stuff wth small group</u> |
| 1 6 9 5 0 | +14015 246929 Bryan Berard* | 10/7/2010 11:03:41 PM(UTC+0) | R e a d | [Berard]: Honestly. Fuck the rest. |
| 1 6 9 5 1 | +14015 246929 Bryan Berard* | 10/7/2010 11:29:07 PM(UTC+0) | R e a d | [Berard]: Same wth mexico too. <u>Uve put up wth enough bullshit over the years. Try get them there \$ back and wash ur hands wth all these retards.</u> |
| 1 6 9 5 2 | +14015 246929 Bryan Berard* | 10/7/2010 11:29:18 PM(UTC+0) | R e a d | [Berard]: And I mean all of them |
| 1 6 9 5 6 | +14015 246929 Bryan Berard* | 10/7/2010 11:55:51 PM(UTC+0) | R e a d | [Berard]: hopefully this is the sign of the beginning of the end. 6 more months done all this shit |
| 1 6 9 5 7 | +14015 246929 Bryan Berard* | 10/7/2010 11:56:06 PM(UTC+0) | R e a d | [Berard]: <u>Hopefully can go after Leaman Borthers soon too</u> |

Continued in November 2010:

| | | | | |
|---------------|--------------------------------------|-----------------------------------|------------------|---|
| 17 76 4 | +14015 246929 Bryan Berard* | 11/9/2010 2:04:37 AM(UTC+0) | R e a d | [Berard]: Basically we shld throw the whole kitchen sink at Tommy and also get on the feds and let's get movn on Lehman and jowdy? |
|---------------|--------------------------------------|-----------------------------------|------------------|---|

Berard was contemporaneously disturbed about the FBI (Galioto) harassing of investors that Jowdy and the “*bad apples*”¹⁰ attorneys considered vulnerable to the fabrications that FBI agent Galioto and “*Jowdy would like the court to think Kenner stole \$7 million from the Hockey players and others...*” (ECF No. 628 at 1: John Kaiser February 2019 reformative verification that *Jowdy stole the money—not Kenner; highlighting Kristen Peca and Michael Peca were also misled by Kaiser, Berard, and Galioto prior to Kristen's revelatory 2012 FBI recordings*¹¹).

Other 3rd party and independent legal advisors for Berard...

Berard—while working with Rudi Giuliani’s team versus Constantine, Jowdy, and Lehman Brothers—expressed his anger to Kenner about FBI agent Galioto who was harassing another Mexico investor about ‘*Kenner stealing their money*’:¹²

April 2010:

| | | | | |
|-----------------------|--------------------------------------|-----------------------------------|------------------|---|
| 1 3 1 4 4 | +14015 246929 Bryan Berard* | 4/28/2010 8:54:28 PM(UTC+0) | R e a d | [Berard]: Tell agent [Galioto] to shut the fuck up. Doesn't have a clue. |
|-----------------------|--------------------------------------|-----------------------------------|------------------|---|

Even a year later—while preparing for the Jowdy-Lehman Brothers litigation with Stolper—attorney Michael Stolper spoke to the SEC (*infra*), while representing 29 Eufora related parties (including Berard) (*Ex. T: signed July 16, 2010 at 9-18: Berard signed at 13 and managed the signature collection process for Stolper's team*)—and eventually the Hawaii-Mexico investors. Stolper’s clients’ sign-offs were a follow-

¹⁰ *Tr.1919 et.al.* —Tyson Nash verification of Myrick, Nolan, Juneau, and Moreau...

¹¹ [Kristen Peca]: *Matt [Galioto] told Michael and I that you stole all of the Hawaii money and never gave it – the loan money -- to...uhhhh...Jowdy.*

• **Kristen Peca—like Nolan's attorney in her exculpatory June 2020—*exhibited no concerns for the loans to Jowdy*—merely alleging Kenner ‘stole’ it and never gave the known-loans to Jowdy...yet still untrue.**

¹² **Noting:** Berard told the FBI in 2013 (after 2-years of Jowdy employment and Kenner slander) that he terminated his relationship with Kenner in 2009 after the Nolan arbitration. Clearly—it was untrue and fabricated for effect (*3500-BB-1-r at 3*).

up to Stolper and Giuliani's demand for forensic accounting (on the record) thru Constantine's attorneys of the 2008-09 private stock sales—one week earlier—leaving nothing possible as *concealed* (*Ex. U at 1*):

“...all evidence related to:...(vii) All capital contributions to Eufora, AZ Eufora Partners I LLC, AZ Eufora Partners II LLC, AZ Eufora Partners III LLC, or AZ Eufora Partners IV LLC.”

Known Home Depot rants by Constantine...

The Constantine and Gaarn 2008-09 private stock sales had been documented by the Eufora investors' attorneys in two (2) separate July 2010 letters to their clients (*Ex. T*) (*Ex. U*). Assuming the Eufora investors read them, including the July 16, 2010 they also countersigned¹³—nothing could have been concealed about the private stock sales without their own willful blindness.

For further Kenner transparency to the attorneys that did not represent Kenner—attorney Stolper and his investigative team—*specifically including John Kaiser and Bryan Berard*—received the August 2010 Home Depot recording made by Kenner two (2) weeks after Stolper's second mailing (*supra*). Stolper's team sued every Eufora-related individual who their 4-month investigation and 3-month negotiations deemed guilty of Eufora related frauds on the investors. *Giuliani's group did not represent Kenner during the Eufora investigations*. Despite Constantine's foundationless allegations of 'cover-ups' and 'conspiracies' in his Home Depot rants—**Kenner was not named a defendant**—nor were any of the 2008-09 private stock transactions referenced by Stolper's lawsuit. This is clearly because the private stock sales—to Stolper's clients—were specifically identified in Stolper's July 8, 2010 request to Constantine's attorneys (*supra*)—and already known to Stolper in advance thru former Eufora CEO, CR Gentry, who was working with Stolper's investigative team since “*April of 2010*” (*Ex. T at 6*).

Over one year later—after volumes of additional disclosures, cross-complaints, unfounded yet investigated allegations by Constantine and Jowdy's attorneys (from every angle)—attorney Stolper explained to the SEC (*Ex. S*)—

[NY Attorney, Michael Stolper—August 2011]: *The only thing I would like to clarify was that I think in your line of questioning, which may not come through in the transcript, whether he [Kenner] disclosed that the SEC has sought enforcement of subpoenas to his clients. I think that the suggestion in your question was that it was*

¹³ See *Upton v. Tribilcock*, *supra*.

something negative that he should disclose to his clients as sort of a warning or red flag to his clients who are relying on him.

*And I think that the conversations that I have been a part of, without waving privilege, **and also my own view** of SEC's involvement in this whole Diamante del Mar, et. al. is a welcome one and that **we** and Mr. Kenner, are really looking to the SEC to enforce the securities laws against Mr. Jowdy and those [Jowdy's cabal] who did wrong here. And we see it as a welcome thing, as a positive thing.*

So the tenor of the conversations with Phil's friends, co-investors, clients is that this is a welcome thing and maybe because we are having this direct communication with the SEC, and then perhaps subsequently with the US Attorneys Office, that maybe they will finally get some justice out of this.

And I know I have said that off the record with you and I just wanted to clarify that in response to that line of questioning. Just a point of information.

Stolper was *still* representing the investor group when he identified "*those who did wrong here*" to the SEC—hoping for U.S. Attorney intervention after Galioto dropped the ball—while assisting Jowdy in misdirection to obfuscate the decade of Jowdy's frauds (only thru August 2011); *See government July 3, 2020 submission* (representing a subset of the frauds since 2008 with Danske—disregarding the documented millions embezzled with Lehman Brothers banker, Bhatti).

Berard's temporal anomalies...

Despite Berard testifying that he had no relationship with Kenner after summer 2009 (*Tr.3055-56*)—Kenner stayed at Berard's NYC condo on Bleeker Street in Manhattan during his August 2011 SEC appearance (over 2 years later). There are over 2,000 texts between Kenner and Berard after he testified he no longer had a relationship with Kenner (including specific references to Kenner's August 2011 stay at his condo).

In fact—Berard suggests with optimism on 10-7-2010 (a year after telling the FBI he cut ties with Kenner) that:

[Berard]: *"I wanna just get these guys there \$ back and let's go do stuff with small group... Honestly. Fuck the rest.... Same with Mexico too. Uve put up with enough bullshit over the years. Try get them there \$ back and wash ur hands with all these retards." ...*

Berard's timeline confabulations at trial were either vindictive—needing to eliminate Kenner and his leadership role in pursuing all things Jowdy (his boss) for the Hawaii-Mexico investors—or his self-verified CTE symptoms discombobulated his temporal recollections. Either way—the actual empirical evidence cannot be deemed the prosecutorial standard by which a verdict of confidence stands with the ‘new evidence’ of Berard's *memory* loss (severe enough that he sued the NHL for damages in 2014—a year before his ‘recollection’ testimony versus Kenner in 2015).

- These issues clearly reach the standard necessary to order an evidentiary hearing—specifically with the grave ramifications of loss (affecting guidelines, forfeiture and restitution calculations).

Berard begins to participate in the Jowdy-devised ‘forgery’ ruse with Kaiser...

John Kaiser's first (1st) assignment for Jowdy was to testify in a Mexico court in 2012 that his name was *forged* ‘by someone’ in another case versus Jowdy ([ECF No. 112-9 at 1-4](#)). Jozef Stumpel sued Jowdy in Mexico for an additional \$1.6 million Jowdy stole from Stumpel and the Baja Ventures 2006 capital account—documented by the government as *true* in [government-forfeiture-36](#). Berard recorded a conversation between himself and Robert Gaudet for FBI agent Galioto in 2012 about the document Kaiser and Berard signed in Mexico. This is the same document the government—and Kaiser—alleged as a forgery to this Court:

[Gaudet]: *“I remember by request and here’s something that when you go thru all the memories now -- and the lawyer said that someone was unavailable at the notary publico – and that was the day we were all —[indecipherable]— waiting to show up – and he wasn’t showing up -- and we were waiting in that back office and then – the guy wasn’t showing up and then – **the lawyer said – sign these papers – take 4 or 5 sheets and then we will put the testimony on these – and here Johnny – we will sign papers** and I don’t know why — [indecipherable]— I guess I can follow it up the following day...”*

[Berard]: *yeah...*

[Gaudet]: ***I know that everybody obliged –***

[Berard]: ***yeah – me and Johnny the same thing...***

[Gaudet]: *[indecipherable]*

[Berard]: *yeah we didn't make – we didn't make testimonies – we basically – we were waiting outside forever – it was too long – and we signed fake -- not uhhhh -- fake – we signed blank pieces of paper with our signatures...*

- Berard verified the Kaiser signature in his own recording after Kaiser's fraudulent forgery testimony in the Mexico court—and the FBI knew it since 2012. Nevertheless—Kaiser and the government chose to specifically lie to this Court to reinforce some grandiose scheme of 'forgeries' that never existed.
- These are chargeable offenses to not just Kaiser—but to those DOJ officials that participated in the premeditated scheme on this Court under 18 U.S.C. 1001. Qualified immunity does not protect the fabrication of evidence.

The "forgery fraud" is a Jowdy pattern—adopted by Kaiser and Berard in multiple jurisdictions...

Berard's first-hand forgery fraud on the Arizona courts with Kaiser (Ex. Y)...

Berard testified in a October 9, 2014 Arizona deposition as a defendant to Darryl Sydor, William Ranford, Tyson Nash, Dimitri Khristich and Jere Lehtinen (*3500-BB-xx*)¹⁴. Berard and Kaiser attempted to steal approximately \$750,000 from these individuals who had legit Promissory notes *signed by Kaiser*. Kaiser finally acquiesced to signing two (2) of them on the eve of the Arizona trial—which Galioto was deftly aware of (*Ex. AA at 1: "John Kaiser's admission that he signed two of the Promissory notes"*—after full denials in the Kaiser's reply to the interveners' original claim).

- In the 2015 Arizona civil trial—Berard and Kaiser lost their defense claims—after trying to blame their frauds on Kenner¹⁵—and arguing Kenner's criminal

¹⁴ This 3500 has still never been delivered to Kenner—despite the government suggesting they gave it to Kenner's trial attorney pretrial. Kenner argued it as 'new evidence' in his first Rule 33 submission; as such.

¹⁵ This was the same unsuccessful defense strategy Jowdy and Harvey attempted in Nevada in the 2010 *Murray v. Jowdy* lawsuit—eventually cross claiming against Kenner as a third party. *Murray and Kenner defeated Jowdy* in the 4-day bench trial with Jowdy authenticating the 2004 Hawaii loan agreement (*Ex. EE*)—in a failed defense that the Hawaii loan was how he was getting his money—not the Murray funds as the Court debunked (*Ex. DD at ¶21, at 11 f.16, at 15 ¶4, at 16-18, at 23 [ruling in favor of Kenner who represented himself in Pro Se during the 4-day proceeding]*). This is the 2004 Hawaii loan agreement (*3500-KJ-2 at 24-25*) that the government grandstanded to the Court Kenner was lying about its authenticity (*Tr.4598: Q [Michiewicz]: "And if that loan document proves to be phony, then you are lying. Correct?"*).

indictment as evidence of “Kenner bad-man”.¹⁶ The Arizona court found both Kaiser (regarding the 5 Kaiser-signed Promissory notes) and Berard (*regarding [i] his signature, [ii] that of tracing witness, Donlan (Tr. 3424), and [iii] the Massachusetts notary signature and stamp: Ex. Z at ¶49*) were not credible (*Id. at ¶9, 20-21, 25-26, 32-33, 34*).

- The FBI interviewed Donlan one year after Kenner's arrest. She refused to acknowledge her name was forged (*Ex. CC*)—or corroborate Berard's Arizona ‘forgery’ claims made during his deposition one month later—but clearly made to the FBI in advance otherwise they would never have called Donlan (*Ex. BB*) to verify the known fabrication by Berard in the Arizona case (*Ex. Y at 1-2*). Yet—Galioto ignored the truth.
- Donlan knew it was real and *refused* to lie to the FBI to assist Berard (at that time)—because she knew Kenner and Berard had a 2-day text conversation contemporaneous with the days Berard and Donlan got the document *signed, notarized, and mailed* it back to Kenner using Kenner's FedEx account (per the texts) (*Ex. Y at 2-3*).
- Kenner—while in EDNY custody—forwarded the Kaiser email-verifications to attorney Baker that Kaiser originally *signed* and *emailed* with Kenner to the Promissory note holders in real time (*Ex. AA at 2-5*). Kaiser denied signing them despite the known empirical evidence—just like Jowdy (his new boss). *These documents were found in the government's Rule 16 production.*
- **Noting:** With Kenner in EDNY custody—Kenner could not complete the civil litigation as the original Plaintiff for the \$1 million-plus Berard and Kaiser stole from Kenner in the same real estate deal—after Berard and Kaiser fraudulently conveyed the property title away from Kenner (*Id. at ¶40, 57*) (*Ex. AA: Galioto and attorney Baker verification of Kaiser-Berard theft from Kenner*).
 - **Fraudulent conveyance of title is now one of the FBI’s heaviest investigated criminal frauds in the U.S.—but not against people working with Jowdy.**

Government “tracing” witness, Lanie Donlan (*Tr.3424, 3438, 3454-55, 3456-57*) was caught lying in the Arizona trial about her name, Berard's name, and the *forgery* of the name and stamp of a Massachusetts notary (*3500-LD-2*) (again with empirical evidence of texts between Kenner and Berard verifying the exact signature transaction) (*ECF No. 668 Appendix at 62-63*):

¹⁶ Kaiser and Berard shared Arizona counsel with Ken Jowdy.

| | | | | |
|-------------|--------------------------------------|-----------------------------------|------------------|---|
| 5 3 2 | +14015 246929 Bryan Berard* | 4/21/2008 6:19:35 PM(UTC+0) | S e n t | [Kenner]: <i>Call me when free about PV [Paradise Valley Arizona renovation home]</i> |
|-------------|--------------------------------------|-----------------------------------|------------------|---|

- Kenner sent the Power of Attorney document to Berard for a **SIGNATURE** and **NOTARY** after they spoke on the phone.

Berard sent the following text to Kenner to confirm Kenner would get Berard's Power of Attorney document signed on the 24th of April (*Ex. CC—day of the signature, witness from Donlan and notarized stamp from William Medlin – Bates stamp: PKHome-00013158-13160*):

| | | | | |
|-------------|--------------------------------------|-----------------------------------|------------------|---|
| 4 6 3 | +14015 246929 Bryan Berard* | 4/23/2008 9:14:25 PM(UTC+0) | R e a d | [Berard]: <i>I get back 2 hoston 2nite so ill get papers 2 u 2morrow so ull have friday!!! Howd u guys do n tourney??</i> |
|-------------|--------------------------------------|-----------------------------------|------------------|---|

In fact—Berard inquired about using Kenner's FedEx account to send Kenner the notarized document “*so ull have friday!!!*” which Berard called a **FORGERY** in the Arizona case:

| | | | | |
|-----|--------------------------------------|-----------------------------------|------------------|---|
| 486 | +1401524692 9 Bryan Berard* | 4/24/2008 7:52:38 PM(UTC+0) | R e a d | [Berard]: <i>Ok 2 use ur fed x acct # 4 package??</i> |
| 582 | +1401524692 9 Bryan Berard* | 4/24/2008 7:52:50 PM(UTC+0) | S e n t | [Kenner]: <i>Yes</i> |
| 487 | +1401524692 9 Bryan Berard* | 4/24/2008 7:54:08 PM(UTC+0) | R e a d | [Berard]: <i>Thanks</i> |

Berard and Donlan lied to the Arizona Court in 2015 about another “*forgery*”. In the adverse ruling to Berard and Kaiser—the Arizona Court hi-lighted Berard's fraud about his name being forged—in concert with Donlan's ‘witness’ signature on the same document with the Massachusetts notary—William Medlin:

¶49. Berard testified that his signature on the Power of Attorney – Special (Arizona exhibit 25) and Deed of Trust (Arizona exhibit 26) were forged. However, Berard signed a number of recorded documents as a grantor, including the Quit Claim Deed transferring the property to John R. Kaiser, Trustee of the Shangri-La Trust 1999 (Arizona exhibit 27).

- **Noting:** The Arizona court made their ruling without ever seeing the Kenner-Berard text messages—or hearing testimony from Kenner.

Berard and Kaiser also found guilty of fraudulent conveyance of the property from Kenner—but still ignored by Galioto and the government...

Finally, the Arizona Judge confirmed that Berard and Kaiser stole the Arizona property from Kenner via fraudulent conveyance, after they began to work hand-in-hand with FBI agent Galioto—just like the Sag Harbor fraudulent conveyance (*Ex. KK*), theft, and sale with fabricated documents and Kaiser or Berard forging Kenner's girl-friend's name (*Ex. MM: Bates stamp: BINDER-450, 452 [FAKE]; Ex. LL: Bates stamp: BINDER000433-434 [REAL]*):

¶57. The March 9, 2012, conveyance of the property by John R. Kaiser as Trustee of the Shangri-La Trust 1999 to "John R. Kaiser, a married man, as his sole and separate property and Bryan Berard, an unmarried man" (exhibit 29) was a fraudulent transfer. A.R.S. §44-1004(A).

- FBI agent Galioto was well-aware of the Kaiser-Berard-Donlan forgery graft long before their 2015 testimony about 'forgeries' and "*tracing*".

Kaiser and Berard stole \$147,000 from Ethel Kaiser—and Galioto looked the other way...

Ethel Kaiser was asked if she ever loaned \$147,000 to her son &/or with Bryan Berard (*Tr.940-41*):

Q At any point in time, ma'am, did you have discussions where you discussed with your son John a matter where he would borrow money from you and then, in turn, loan that money to Bryan Berard?

MR. MISKIEWICZ: Objection. Scope.

THE COURT: Overruled. You can answer.

A [Ethel Kaiser]: No, that didn't happen.

Yet—John Kaiser verified he took the \$147,000 from his mother (*Tr.1160*)—unknown to her (*supra*)—and immediately sent \$95,000 to Bryan Berard as part of the theft (*Ex. FF*).

Another John Kaiser theft from his mother—unknown to her...

Kaiser testified to the Court that he sold his Long Island home to repay his mother and friends the \$1 million he solicited from them in 2005 for the Hawaii project (*Tr.979-80*).

Q Did there come a time that Mr. Kenner gave you the funds that you loaned him, plus interest?

A [John Kaiser]: No.

Q What, if anything, did you do regarding the money that you had assembled and borrowed and subsequently lent out to Mr. Kenner from the money you collected from your family and friends?

A [John Kaiser]: Well, it wasn't coming back from him and at the time I decided to put my house -- I was living -- on the market because my wife and I we had built a nursery so it was best just to move on, so I put the house on the market. And somewhere in September I put house I was living in on the market.

Q Did you sell that house?

A [John Kaiser]: It sold relatively quickly. Approximately within two weeks.

Q And what were the proceeds from the sale of that house?

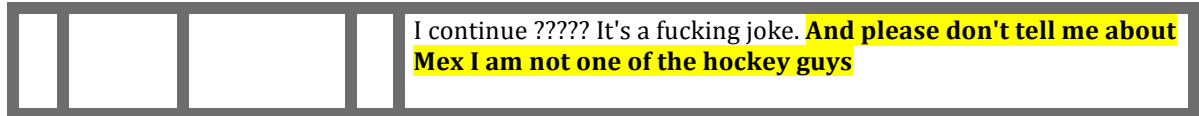
A [John Kaiser]: Approximately \$1.2 million.

Q What did you do with the \$1.2 million, the proceeds from the sale of your house?

A [John Kaiser]: I paid back my family members and friends with interest.

Despite the bank records that confirm Kaiser was repaid \$1,176,000 in August 2006 from the JV closing with Lehman Brothers on the Hawaii deal for that \$1 million advance—and another \$100,000 in 2006—Kaiser lied to the Court claiming ‘*that money*’ was “*back pay*” and “*expenses*” (*Tr.1413-14*). Neither are true nor documented in reality anywhere. Yet—in total desperation in 2011 when the real estate recession occurred—Kaiser confessed about that \$1 million to Kenner via text that he never paid them back:

| | | | | |
|---|---------|-----------|---|--|
| 1 | +163123 | 7/22/2011 | R | [John Kaiser]: Yes and that is not [sic] [not] the only money that |
| 2 | 50308 | 2:17:04 | e | is owed out , that I have been working everyday to pay back |
| 6 | John | PM(UTC+0) | a | everyone |
| 7 | Kaiser* | | d | |
| 2 | | | | |
| 1 | +163123 | 7/22/2011 | R | [John Kaiser]: 5k month for back taxes on the sale of 87 laurel |
| 2 | 50308 | 2:57:35 | e | made 250 k [his prior home that allegedly paid back \$1 million in |
| 6 | John | PM(UTC+0) | a | loans], 100k went to u [to Kenner for loan repayments] , 150 vin |
| 7 | Kaiser* | | d | [Tesoriero] owes, 3300 a month goes towards cards from Pv |
| 4 | | | | [Arizona] Reno, was paying my mother [Ethel], \$ 2500 a month |
| | | | | for the 1 mil we took from her, left her with no money to live, |
| | | | | now paying her \$1500 a month, Took 380k from brother Keith, |
| | | | | left him w/shit , we where supposed to send him back money after |
| | | | | sale of [Kenner's] little house in mex, u sent me 4k for him, i send |
| | | | | him \$500 a monyh to live on . . And 4k to 6k to Pv a month . Should |



- *None of Kaiser's friends & family are aware of the truths.*

[Kaiser]: “*100k went to u*”

Kaiser confirmed via text that *he owed Kenner money* in 2011, *not the other way around*, based on a fabricated collateral agreement (*ECF No. 628 at 1*) that defies all logistical tests **and** the empirical bank records. The government stipulated bank records verified Kaiser was fully repaid by the Hawaii partners in 2006—and his California joint venture with Kenner by Spring 2008.

[Kaiser]: “*And please don't tell me about Mex I am not one of the hockey guys*”

In 2011—Kaiser confirmed to Kenner that he has “*no interest in Mexico*” and the problems with Jowdy. ***How could this be possible*** if Kaiser's ‘alleged’ collateral agreement with Kenner is real (*Ex. HH*)?

- The Court must demand an answer as to how Kenner “*ruined*” Kaiser's life (*Tr.1089: Kaiser; Tr.5753: government summation*) if the collateral agreement is real—**worth over \$100 million at the date of transfer**—despite only being presented by Kaiser in 2014 for the first time after Kenner was arrested and Kaiser was working for Jowdy?
- Even so—Kaiser worked for Jowdy for 5+ years (2011-2017) and could have negotiated any equity transfer he wanted to “*[un]ruin*” his life and ‘really’ repay the friends & family he had been stealing from since 2005.

Stunningly—with his life “*ruined*”—Kaiser did not sell any of it!

Noting: Kaiser referenced the ‘alleged’ agreement in his *shocking* February 2019 letter for collateral is real (*ECF No. 628 at 1*)—and during his surreal trial testimony “*That's the only investment I have left.*” (*Tr.1089*). It is amazing brazenness—Jowdy style (see the government's July 3, 2020 exposé submission). In 2014 while working for Jowdy—Kaiser *now* has an interest in Mexico? It is more perjury and logistically impossible matter (*unless its payback—complicit with Jowdy—was for the Kenner arrest help*).

- Kaiser was working with Jowdy in 2012—when Kenner secured a \$20 million offer for the CSL Properties LLC equity and Baja Ventures 2006 LLC equity (*Ex.*

[NN](#)). Every investor would have been made whole if Jowdy had allowed the deal to complete...BUT...

- Jowdy, Danske Bank, and Masood Bhatti could never let a 3rd party review the budget thefts documented from March 2006 ([ECF No. 667 at 13-17](#))—further based on the government's July 3, 2020 submission.
- Nevertheless—Kaiser (who knew about the 2012 offer)¹⁷ would have received liquidity (if the agreement was real—per his under oath testimony) and been able to repay everyone he robbed with Bryan Berard.

Kenner explained to Kaiser in late 2011—just prior to his Jowdy employment commencement—that the U.S. and Mexico litigation was the only solution and he had to remain patient...

Kenner further explained to Kaiser that patience thru the litigation process with the various fraudsters (Constantine and Jowdy)—with the investors represented by experienced attorneys was the only possible remedy, and the sale of multiple real estate projects would eventually generate funds for Kaiser to repay the people he personally borrowed money from since 2005 and never repaid (a.k.a. 'stole from').

Kenner's advice was *before* Kaiser and Berard desperately stole the Arizona title thru documented fraudulent conveyance of title ([Ex. Z](#))—but *before* Kenner discovered Kaiser and Berard had forged and fabricated documents, in Rule 16 evidence, to steal the LedBetter property in Sag Harbor (all known to FBI agent Galioto in real time):

| | | | | |
|---|---------|-----------|---|--|
| 1 | +16312 | | | [Kenner]: Buddy. When PV [Arizona] sells, people will get money. When |
| 7 | 350308 | 7/22/2011 | S | Stolper [Eufora] wins, people will get money. When out east [Sag |
| 4 | John | 3:57:46 | e | Harbor] sells, people can get money. When palms [Vegas] sells, people |
| 2 | Kaiser* | PM(UTC+0) | n | can get money. Just send the \$5k [more Kaiser attempted to steal from |
| 2 | | | t | Kenner] for now. Baby steps get us out of this... |
| 1 | +16312 | | | |
| 7 | 350308 | 7/22/2011 | S | |
| 4 | John | 3:59:29 | e | [Kenner]: <i>Why are you mad at me? Constantine fucked us!</i> |
| 2 | Kaiser* | PM(UTC+0) | n | |
| 3 | | | t | |

Days later—Berard was communicating with Kenner (*infra*) about the same litigation efforts thru the investors' Mexico attorneys and Giuliani's group with Constantine. **Kenner reminded Berard** that Constantine and Kaiser convinced Kenner and the Hawaii partners that **they** could negotiate with Jowdy in 2007-08

¹⁷ Kaiser and Berard personally knew the intermediary—John Mahoney—because two (2) years earlier Kaiser borrowed \$33,750 from Mahoney which is still outstanding today ([Ex. 00](#)).

instead of suing Jowdy immediately—once Kenner discovered the Jowdy thefts in October 2006 and non-repayment plans to anyone. The Hawaii loan values totaled approximately \$20 million with interest at the time—corroborated by Michael Peca's 2011 SDNY Grand Jury testimony (*Ex. GG: 3500-MP-5 at 30*); and hi-lighting Kaiser's 2007 knowledge of the stolen Hawaii loans by Jowdy, etcetera:

| | | | | |
|---|---------|-----------|---|---|
| 1 | +140152 | | | |
| 7 | 46929 | 7/25/2011 | S | [Kenner]: I'm the one who wanted to sue Jowdy in 2007. Johnny |
| 4 | Bryan | 2:36:38 | e | [Kaiser] and the Greek [Constantine] talked me out of it. Look how |
| 9 | Berard* | PM(UTC+0) | n | that turned out... |
| 6 | | | t | |

Berard replied—2 minutes later—to Kenner (*infra*) about the time the litigation has taken to recover funds from thieves who were unwilling to negotiate with Kenner and Kenner investors' attorneys.

Berard's stress was primarily based on Berard spending himself *broke* by 2011, as documented—and zero due to theft or graft by Kenner or anyone, despite his historically reformatory recollections espoused in his personal literary effort “*Relentless*” (wholly foundationless relating to Kenner) and his substantiating podcasts to sell his book with fabrications that would fail under civil review:

| | | | | |
|---|---------|-----------|---|---|
| 1 | +140152 | | | |
| 2 | 46929 | 7/25/2011 | R | [Berard]: LOOK how everythings turned out. SHIT. We've been suing |
| 7 | Bryan | 2:38:07 | e | for years and still NOTHING. We have nothing. |
| 2 | Berard* | PM(UTC+0) | a | |
| 2 | | | d | |

Via text message (*infra*), **Kenner (3 minutes later) had to reiterate the facts to Berard** for the Hawaii partners lawsuits (1) versus Jowdy (2008-09 Arizona), (2) for Glen Murray's case in Nevada versus Jowdy (2008-2010), and (3) the subsequent California cases (2009-10) versus Jowdy for the loaned funds—where he was a Plaintiff, without Berard sharing a single expense for any of the legal efforts—in any of the cases:¹⁸

¹⁸ **One**—Berard *independently* signed off as a Plaintiff in the 2008-09 Arizona case versus Jowdy with attorney Tom Baker on 10-19-2009 (and faxed from a NY Kinkos by Berard on 10-20-2009); fully acknowledging the Hawaii partners loans to Jowdy (*Ex. O at 9-16*).

- The 19-signed Attorney Baker disclosures were *withheld* by the government pre-trial and *mistakenly* turned over by AUSA forfeiture counsel during their post-trial disclosure productions (*Brady* issue); wholly verifying every Hawaii partners investors' transparent and independent knowledge (without complaints).

Two—Berard *independently* signed off with attorney Ronald Richards in the two California cases versus Jowdy and participated in multiple conference calls and face-to-face meetings seeking resolution of the same Hawaii partners' loans to Jowdy (*Ex. W at 7*) (*Ex. X at 7*).

| | | | | |
|---|---------|-----------|---|---|
| 1 | +14015 | | | [Kenner]: Nope. We starting to sue 2 years ago after 18 months that |
| 7 | 246929 | 7/25/2011 | S | Kaiser & the greek [Constantine] wanted to negotiate with Jowdy. I |
| 4 | Bryan | 2:41:07 | e | wanted to go after him in 2007. Remember that muzz's [Glen |
| 9 | Berard* | PM(UTC+0) | n | Murray] NV case took 26 months to get to trial. We only started suing |
| 8 | | | t | Jowdy in the big CA case 23 months ago. I know this stuff ONLY because |
| | | | | I've lived every detail of it... |

Conclusion...

All of the revisionary testimony—and CTE related and confessed memory loss should cause the Court to pause about the reliability of any Berard witness testimony (or others). The mere fact that all of Berard's accusatory testimony is wholly refuted by a multitude of evidence that he not only knew about his Hawaii LOC "*investment*" at all times—but that until he and Kaiser collectively spent themselves "*broke*" (*Ex. PP*) by 2011—BUT—there is no equivocation about who was *authorized* to transact on Berard's LOC account for his "*investment*" (*Ex. V*) and who really stole his money (his boss at the time of the controversial testimony against Kenner).

Yet—with FBI agent fully aware of Berard's LOC knowledge and CTE litigation, the government offered Berard as a reliable witness without a single corroborating empirical record—only testimony of what '*he remembered never being told*'!

Again—Kenner respectfully reiterates his request for an evidentiary hearing as to Berard's loss amount (argued by Kenner as zero) and victim status—and the CTE issues raised when discovered approximately 18 months ago.

Three—Berard *independently* filed multiple testimonials in the various criminal lawsuits versus Jowdy in Mexico during this same period of time; in fact confessing on his own FBI recording in 2012 that he and Kaiser '*signed*' the Mexico testimonials ([Berard]: "*we signed fake -- not uhhhh -- fake -- we signed blank pieces of paper with our signatures...*") in the *Stumpel v. Jowdy* \$1.6 million theft case (*ECF No. 771, ECF No. 782*). These are the same testimonials that Kaiser and the AUSAs offered to the Court in 2014 as "forgeries" of Kaiser's name, again (*ECF No. 112-9 at 1-4: ironically signed by Kaiser—and later refuted as 'forged' after his employment*).

- The Court should note that 100% of the Kaiser forgery allegations (EDNY, Mexico and Arizona) have been proven as perjury (including the Berard and Donlan Arizona forgery lies) with empirical evidence from Rule 16 production—or incredible circumstances like the recovery of the two (2) "*original ink*" Constantine consulting agreements from Kaiser's home on the eve of trial; *See United States v. Gil*, 297 F.3d 93 (2d Cir 2002) -- and then **concealed** from the government signature expert **and never admitted into evidence** during trial (*Tr.990-91* [Kaiser], *Tr.3622, 3626* [Petrellese]); a clear *Rule 1002, "Best Evidence Rule"* violation and premeditated fraud on the Court.

The Second Circuit opined in *United States v. Ebberts*, 458 F.3d 110 (2d Cir 2006),

“[t]he loss must be the result of the fraud.” *Id.* at 128. **“[l]osses from causes other than the fraud must be excluded from the loss calculation.”** *Id.*

Sincerely,

Phil Kenner, Pro Se

Submitted August 27, 2020